

# United States District Court

EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION

VICTOR W. FOSTER

v.

THE BANK OF NEW YORK MELLON,  
f/k/a THE BANK OF NEW YORK, as  
TRUSTEE (CWALT 2004-22CB), and  
BAYVIEW LOAN SERVICING, L.L.C.

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Civil Action No. 4:17-CV-319

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(Judge Mazzant/Judge Nowak)

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## **MEMORANDUM REJECTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

Came on for consideration the report of the United States Magistrate Judge in this action, this matter having been heretofore referred to the Magistrate Judge pursuant to 28 U.S.C. § 636. Plaintiff's Amended Complaint alleges four causes of action: a breach of contract/promissory estoppel claim and claims for violations of Real Estate Property Settlement Procedures Act ("RESPA"), the Federal Debt Collection Practices Act ("FDCPA"), and the Texas Property Code (Dkt. #13 at pp. 9–15). Plaintiff also seeks a declaration that Defendant Bayview is without authority to conduct a foreclosure sale (Dkt. #13 at p. 14). On October 13, 2017, the Magistrate Judge issued a report and recommendation concluding that Plaintiff's Amended Complaint in its present form failed to state any viable claim for relief against Defendants. The Magistrate Judge further concluded that Plaintiff's RESPA claim could potentially be cured by amendment, and thus, recommended denying dismissal of such claim and allowing Plaintiff an opportunity to replead (Dkt. #26). In this particular case, Plaintiff has expressly requested a further opportunity to replead his claims before dismissal.

The Court's general practice, when allowing a plaintiff to replead, is to deny the motion to dismiss as moot subject to reconsideration. If no amended complaint is filed, the Court will then automatically reconsider the motion to dismiss without any additional briefing by a defendant. The Court allows litigants opportunity to plead their best case before dismissing their claims. Here, the Court finds that Plaintiff has requested and could potentially cure certain of the pleading deficiencies identified if provided another opportunity to amend.

As such, the Court rejects the Report and Recommendation of the Magistrate Judge. Accordingly,

It is therefore **ORDERED** that the Magistrate Judge's Report and Recommendation (Dkt. #26) is **REJECTED**.

It is further **ORDERED** that Defendant's Motion to Dismiss (Dkt. #14) is hereby **DENIED AS MOOT** subject to reconsideration if no amended complaint is filed.

It is further **ORDERED** that Plaintiff be granted leave to file a further amended complaint no later than fourteen (14) days from the date of this Order.

**IT IS SO ORDERED.**

**SIGNED this 7th day of December, 2017.**

  
AMOS L. MAZZANT  
UNITED STATES DISTRICT JUDGE